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In the

# Supreme Court of the United States

at the

October Term, A.D., 1930.

No. 358.

INTERSTATE TRANSIT, INC.,
*Appellant,*

vs.

DICK LINDSEY,
*Appellee.*

## *JURISDICTIONAL STATEMENT OF APPELLANT.*

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In the

# Supreme Court of the United States

at the

October Term, A.D., 1930.

General No. 358.

INTERSTATE TRANSIT, INC.,
*Appellant,*

vs.

DICK LINDSEY, COUNTY COURT CLERK,
*Appellee.*

Appeal from the Supreme Court of Tennessee.

## *STATEMENT OF APPELLANT SHOWING JURISDICTION IN SUPREME COURT OF UNITED STATES TO REVIEW FINAL JUDGMENT OF SUPREME COURT OF TENNESSEE.*

(This is an appeal under Section 237 (a) of the Judicial Code (Section 344 U. S. C., Title 28), as amended by Chap. 229, 43 Stat. 936, Act of Feb. 13, 1925, and effective May 13, 1925.)

In compliance with Paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States, Appellant, Interstate Transit, Inc., herewith files the following statement, particularly disclosing the basis on which it is contended this Honor-

able Court has jurisdiction to review on appeal the judgment or decree of the Supreme Court of Tennessee rendered in this case:

## I.

## STATEMENT OF CASE.

Appellant, Interstate Transit, Inc., is a corporation, organized and existing under the laws of the State of Ohio, with its home office or principal place of business located in the City of Cincinnati, Ohio.

*(Tr., pp. 3-4.)

Appellant is engaged in the transportation of passengers for hire by motor bus. Such transportation of passengers is exclusively interstate, over Federal Aid Highways. Its route is between Cincinnati, Ohio, and Atlanta, Georgia, via Louisville, Kentucky, and Nashville, Tennessee.

(Tr., p. 5.)

Appellee, Dick Lindsey, is the County Court Clerk of Davidson County, Tennessee (Nashville), and is charged by law with the duty of collecting privilege and occupation taxes for the State of Tennessee.

(Tr., p. 4.)

This proceeding seeks to review and reverse the action of Supreme Court of Tennessee in sustaining the validity of the following statute of Tennessee:

## STATUTE ASSAILED AS BEING REPUGNANT TO COMMERCE CLAUSE OF FEDERAL CONSTITUTION.

Chapter No. 89, Public Acts of Tennessee for the year 1927, at page 283, of the published volume, is as follows:

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(*References are to page numbers of typed transcript of the record certified by Clerk of Supreme Court of Tennessee).

CHAPTER No. 89

REVENUE BILL.

SENATE BILL No. 589.

(By Sub-committee of Finance, Ways and Means Committee of both Houses).

AN ACT ENTITLED, "An Act to provide for General Revenue for the State of Tennessee, and the counties and municipalities thereof, to be known as the General Revenue Bill."

. . . . . .

SECTION 4. *Be it Further Enacted*, That each vocation, occupation and business hereinafter named in this section, is hereby declared to be a privilege, and the rate of taxes on such privilege is hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of such revenue:

. . . . . .

STATE PRIVILEGE TAX ONLY.

Each person, firm or corporation operating an automobile bus carrying passengers upon the highways of this State, for a distance of more than ten miles per trip, and not liable for a privilege tax under the foregoing provision, shall pay as follows:

Each bus carrying over 20 passengers, and less than 30 passengers, per annum, $500.00.

*Provided*, that this tax shall be in lieu of all county and municipal taxes; provided, further, privilege taxes accruing under this heading shall go and belong exclusively to the General Funds of the State.

(Public Acts of Tenn. for 1927, pp. 283, 284, 291.)

Said Act, in the *proviso* above referred to, provides that this tax shall be in lieu of all county and municipal taxes, and *that such privilege taxes accruing under this heading shall go*

*and belong exclusively to the General Funds of the State.* (Italics ours.)

Appellant, Interstate Transit, Inc., involuntarily and under protest, paid such privilege tax on eight 29-passenger busses used by it in Tennessee for the interstate transportation of passengers for hire and filed its original bill in the Chancery Court at Nashville, Tennessee, against the Appellee, Dick Lindsey, to recover the said privilege taxes paid by it under protest and involuntarily.

(Tr., pp. 9-10-11.)

It was averred in said bill that the tax levied in Section 4, of Chapter 89 of the Acts of Tennessee, for the year 1927, (1st) had no application to interstate operations, and (2nd) if applicable to interstate operations, same was an unreasonable burden on interstate commerce, and offensive to Article I, Section 8, Clause 3, of the Constitution of the United States (Commerce Clause).

(Tr., pp. 10-14.)

Appellee, Dick Lindsey, answered the said original bill, averring, among other things, that said tax applied to interstate commerce and was not offensive to the Federal Constitution.

(Tr., pp. 22, 23, 24.)

The Trial Court held that Appellant was engaged exclusively in transporting passengers for hire interstate, and was therefore not subject to the payment of the said tax, and rendered a judgment in favor of appellant and against appellee for the amount of the tax paid involuntarily.

(Tr., p. 32.)

The appellee herein appealed said case to the Supreme Court of Tennessee, which court reversed the Chancellor, and dismissed appellant's bill.

(Tr., pp. 33, 49.)

## II.

## JURISDICTION OF SUPREME COURT OF UNITED STATES.

U. S. C., Title 28, Section 344 (Jud. Code, Section 237), Paragraph (a), is as follows:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."
>
> (Act of Feb. 13, 1925, Chap. 229, 43 Stat., 936.)

Under the Act of Congress of January 31, 1928, Chap. 14, 45 Stat. ———, as amended by the Act of April 26, 1928, the review which could be had in the Supreme Court of the United States on writ of error, as provided by Act of Feb. 13, 1925, Chap. 229, 43 Stat., 936, may now be obtained on appeal.

The Supreme Court of Tennessee is the highest court in the state in which a decision in the suit could be had.

Sections 1 and 2, Article 6, of the Constitution of Tennessee are as follows:

> "SECTION 1. *Judicial Power.*—The Judicial power of this state shall be vested in one Supreme Court, and in such circuit, chancery and other inferior courts as the

legislature shall from time to time, ordain and establish; in the judges thereof, and in justices of the peace. The legislature may also vest such jurisdiction in corporation courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established.

"SECTION 2. *Supreme Court.*—The Supreme Court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the state. The judges shall designate one of their own number who shall preside as chief justice. The concurrence of three of the judges shall in every case be necessary to a decision. The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court. Said Court shall be held at Knoxville, Nashville and Jackson."

The judgment or decree of the Supreme Court of Tennessee is final since said Court is the highest of the state and its jurisdiction is appellate only.

Appellant's bill was dismissed by the said Court in the following language:

"We are of opinion that the Revenue Act applies and that the tax is valid. The decree must be reversed and the bill dismissed."

(Opinion Supreme Court, Tr., pp. 49-50.)

## III.

## NATURE OF CASE AND RULINGS.

There was drawn in question the validity of Chapter 89, Acts of Tennessee for the year 1927, on the ground of its being repugnant to the Constitution of the United States.

(Tr., pp. 10, 14.)

It was averred in the bill that the said privilege tax placed an unreasonable burden on interstate commerce, and was

repugnant to Article I, Section 8, Clause 3, of the Federal Constitution.

(Tr., pp. 10, 14.)

And the Supreme Court of Tennessee, in its published opinion in this case, said:

> "The corporation says that it transports interstate only, that therefore the Act does not, fairly construed, embrace it, and that if construed to embrace it the tax laid would be in contravention of the Commerce Clause of the Federal Constitution. (Art. I, Sec. 8, Clause 3.)
>
> "The state insists, (1) that the corporation transports both intra-state and interstate, and therefore comes within the terms of the Act, and (2) that even though its business is interstate only, the Act applies and the Federal Constitution does not prohibit its application."
>
> (Opinion Supreme Court, Tr., p. 41.)

The Supreme Court of Tennessee, in its decree and judgment, sustained the validity of Chapter 89, Acts of Tennessee for 1927, in the following language:

> "We are of opinion that the Revenue Act applies and that the tax is valid."
>
> (Opinion Supreme Court, Tr., p. 49.)

The Trial Court found as a matter of fact that appellant was engaged exclusively in interstate commerce.

(Tr., p. 32, Par. 3.)

And the Supreme Court of Tennessee, in its decree and judgment, found that appellant was doing interstate transportation only.

(Opinion Supreme Court, Tr., pp. 41-42.)

The Supreme Court of Tennessee, in its decree, held that Chapter 89, Acts of 1927, referred to as the Revenue Bill, embraces in its terms busses transportating interstate.

Said the Court:

> "We think this section of our Revenue Act embraces in its terms busses transporting interstate . . ."
> (Opinion Supreme Court, Tr., p. 43.)

And there further appears in the Opinion of the said Supreme Court the following:

> "Nor is this tax apparently unduly burdensome. Not only is the charge approximately the same on all motor vehicles of like passenger carrying capacity, whether traveling wholly within the state or not, but it is fixed according to a 'uniform, fair and practical standard.'".
> (Opinion Supreme Court, Tr., p. 44.)

In order to determine the question presented in this case, it was necessary to pass on the validity of Chapter 89, Acts of Tennessee, for 1927, as measured by the Commerce Clause of the Federal Constitution.

It was alleged in the original bill that the tax levied by said statute "is a revenue measure, and the proceeds therefrom go and belong exclusively to the general funds of the state. Such a tax on complainant's operations is an unreasonable burden on interstate commerce and therefore void. *The proceeds of such privilege taxes are not used in the construction and maintenance of highways, but go into the general funds of the state.*" (Italics ours.)
(Tr., pp. 14-15.)

The Supreme Court of Tennessee, in answer to this averment, which is admitted by the Stipulation (Tr., p. 28, Par. 3), said:

> "Clear as it is, both on principle and authority, that the state may exact a charge for the use of its highways, without reference to whither the user comes, or whence he goes, we are not of opinion that the form or name of the charge is determinative of the right. Nor are we persuaded that the right is defeated by a failure to desig-

nate in the Act by restrictive terms the fund into which the proceeds are primarily to go. This is hardly more than a matter of bookkeeping. Once in the general funds of the state, as provided by this Act, it is subject to distribution and allocation in any direction where it may be found to be most needed. If it meets or relieves the state's requirements in one direction, more is left for application in another. It is a contribution to the up-keep of the State's government as a whole, and a large part of this up-keep cost is the item of highways."

(Opinion Supreme Court, Tr., p. 46.)

The excerpt from the opinion of the Supreme Court of Tennessee, next hereinabove quoted, is contrary to the settled legislative policy of Tennessee with reference to its "police power" as it affects motor vehicles in interstate commerce.

To illustrate:

Chapter 58, Acts 1923, as amended, levies a tax of five (5) cents per gallon on all gasoline and distillate sold in Tennessee, *such fund to be used solely in the construction and maintenance of a highway system.* (Italics ours.)

Chapter 73, Acts 1917, is the Automobile Registration Law of Tennessee, requiring all motor vehicles to be licensed and a tag placed on such vehicles. Said license fee is graduated according to horsepower. Such fund derived from said licensing of motor vehicles is used exclusively for highway maintenance and construction, with the exception of ten (10) per cent thereof, which is used for enforcement of the Act.

Chapter 58, Acts 1929, is the Motor Vehicle Act of Tennessee. Said statute requires the filing of schedules, tariffs, rates, etc., with the Public Utilities Commission of Tennessee, as well as Public Liability Insurance on vehicles for hire, to protect persons in Tennessee who might be injured in their persons or property by the negligent operation of such vehicles for hire.

Under said act automobiles or busses for hire are required to pay a fee of Two Dollars and Fifty ($2.50) Cents per annum per passenger seat provided for passengers in each vehicle, such fund so derived to be used exclusively by said Utilities Commission in the enforcement of said act. Such fee is designated in the act as a fee "for the inspection, control and supervision of the business. . . ."

The three statutes above referred to, viz.: Gasoline tax, automobile registration law and motor vehicle regulation act, are the only statutes in Tennessee enacted for the purpose of raising funds for highway maintenance, construction and regulation. Said statutes are police regulations similar to those statutes litigated in the cases of *Hendrick* v. *Maryland*, *Clark* v. *Poor, et al.*, and *Kane* v. *New Jersey*, in the Supreme Court of the United States.

The statute in question is the Revenue Bill of Tennessee. Appellant has complied with the three statutes referred to above.

(Tr., pp. 28-29.)

## IV.

## SUBSTANTIAL FEDERAL QUESTION PRESENTED.

It will be observed, from the quotation from the Opinion of the Supreme Court of Tennessee, next hereinabove set out, that the said Court swept aside the distinction between the taxing power and the police power of the state.

The Supreme Court of Tennessee predicated its decision upon the cases of—

*Hendrick* v. *Maryland*, 235 U. S., 610, 59 L. Ed., 385.
*Clark* v. *Poor, et al*, 274 U. S., 557, 72 L. Ed., 1200.
*Kane* v. *New Jersey*, 240 U. S., 160, 61 L. Ed., 222.

Further, the Court said the case of *Sprout* v. *South Bend*, 277 U. S., 170, 72 L. Ed., 837, was in accord with the above cited cases.

The three cases, *Hendrick* v. *Maryland*, *Clark* v. *Poor* and *Kane* v. *New Jersey*, *supra*, clearly illustrate the police power of the states, while *Sprout* v. *South Bend*, *supra*, was an example of the taxing power.

The three cases referred to sustained regulatory measures as applied to interstate commerce, while the latter case clearly shows a tax, levied under the taxing power, is offensive and repugnant to the Commerce Clause of the Federal Constitution, and therefore void.

In the instant case, as in the case of *Sprout* v. *South Bend*, *supra*, the statute in question is the Revenue Bill, and the proceeds of the tax go into the General Funds of the state, while in the "police power" cases, the statutes were regulatory, and a substantial portion of the proceeds was used in highway maintenance and construction, as well as being used for enforcement of the acts in question.

Under the decision of the Supreme Court of Tennessee in the instant case, any business or occupation in interstate commerce (subject to state regulation) may be taxed by the state for the privilege of carrying on such business or occupation, and avoid the inhibition in the Constitution of the United States with reference to "regulating commerce among the several states" by referring the question to principles of *bookkeeping*. (Italics ours.)

The Supreme Court of the United States, since shortly after the adoption of the Constitution, has steadfastly held that a tax, under whatever guise, placed on the right to carry on commerce between the states, invades a field reserved for Federal regulation, and is therefore void.

*Brown* v. *Maryland* (1827), 12 Wheaton, 419.

And in numerous decisions the Court has been at pains to define the scope and extent of the authority of the states, under their police power, to levy a monetary exaction from persons, firms or corporations carrying on commerce between the states.

*Sprout* v. *South Bend, supra.*

The paramount and controlling question in the case, viz.: "what is the purpose of the levy, as shown by the statute," is swept aside by these words in the opinion of the Supreme Court of Tennessee:

> ". . . This is hardly more than a question of bookkeeping. Once in the General Funds of the state, *as provided by this Act*, it is subject to distribution and allocation in *any direction where it may be found to be most needed*. . . . It is a contribution to the state's government as a whole. . ." (Italics ours.)
> (Tr., p. 46.)

It is respectfully insisted that the Federal question presented is substantial since the decision of the Tennessee Court in the instant case has obliterated and destroyed the distinction between those two great powers of the states, "taxing" and "police."

If a person, firm or corporation engaged in an interstate business in Tennessee, which is a proper subject for police regulation, can be brought within the purview of a taxing statute by referring the question to a "matter of bookkeeping," then interstate commerce in Tennessee can be destroyed.

## V:

## DATES OF JUDGMENT AND APPLICATION FOR APPEAL

The said final decree or judgment of the Supreme Court of Tennessee was rendered on the 28th day of June, 1930, in an opinion for publication by Associate Justice, A. W. Chambliss. The opinion of the Supreme Court of Tennessee is found on pages 40-49 of the transcript.

(Tr., p. 50.)

On the 2nd day of August, 1930, appellant presented its petition for appeal to the Supreme Court of the United States to the Honorable Grafton Green, Chief Justice of the Supreme Court of Tennessee, which appeal was allowed on said date by the said Chief Justice.

(Tr., pp. 51-65.)

Said petition for appeal was filed in the Tennessee Supreme Court on the 2nd day of August, 1930.

(Tr., p. 65.)

Accompanying said petition for appeal, and filed on same date, was an assignment of errors.

(Tr., pp. 66-68.)

Bond for the said appeal in the sum of $1,000.00 has been made by appellant and filed with the Clerk of the Supreme Court of Tennessee, which bond is approved by the Chief Justice of Tennessee.

(Tr., pp. 75-76.)

On the 2nd day of August, 1930, the appeal in said case was issued by the Clerk of the District Court of the United States for the Middle Division of Tennessee, at Nashville, which was

filed with the Clerk of the Supreme Court of Tennessee, on the 2nd day of August, 1930.

(Tr., pp. 70-71.)

Citation to appellee issued on same date, signed by the Honorable Grafton Green, Chief Justice, returnable thirty (30) days therefrom. Service of said citation was acknowledged by counsel for appellee on August 2, 1930.

(Tr., pp. 77-78.)

On the 16th day of August, 1930, the Clerk of the Supreme Court of Tennessee transmitted to this Honorable Court as the transcript of the record, certain portions of the record in this case as designated by counsel, which case has been regularly docketed, and the record filed. Appearance of counsel for appellant has been entered.

## VI.

## CITATION OF CASES TO SUSTAIN JURISDICTION.

The Supreme Court of the United States has jurisdiction to review a decision in a suit in which the validity of a state statute was attacked on the ground of its alleged repugnancy to the Constitution of the United States, and the decision was in favor of its validity, though the state was a party to the suit and it might originally have been brought in the Supreme Court.

*Cohens* v. *Virginia*, 19 U. S. (6 Wheat., 264), 5 L. Ed., 257.

The Supreme Court of Tennessee held that a Federal question was made before it, and proceeded to determine it.

(Tr., pp. 41, 44.)

And the Supreme Court of the United States will regard a Federal question as having been made under such circumstances.

*Miedreich* v. *Lowenstein*, 232 U. S., 236, 34 S. Ct., 309, 58 L. Ed., 584.

The Supreme Court of Tennessee held that appellant was engaged exclusively in transporting passengers for hire by motor bus interstate.

(Opinion Supreme Court, Tr., pp. 41-42.)

And the transportation of passengers for hire by motor bus interstate is "commerce between the states."

*Buck* v. *Kuykendall*, 267 U. S., 307, 45 S. Ct., 324.
*Geo. W. Bush* v. *Maloy*, 267 U. S., 317, 45 S. Ct., 326.

So it follows that a Federal question was presented and its decision was necessary to the determination of the case, and the judgment as rendered could not have been rendered without deciding it.

Under such circumstances the Court has jurisdiction.

*Adams* v. *Russell*, 229 U. S., 363, S. Ct., 846, 57 L. Ed., 1224.

And a writ of error or appeal will not be dismissed for want of jurisdiction, where a Federal question is clearly raised, merely because the claim by which it is presented is not well founded.

*Blythe* v. *Hinckley*, 180 U. S., 333, 21 S. Ct., 390, 45 L. Ed., 557.

In the exercise of the appellate jurisdiction of the Federal Supreme Court over state Courts, the former Court is bound by the construction of a state law adopted by its Court of last resort. But the Federal Supreme Court, while bound by the construction of a state statute adopted by the state Court of last resort, is not concluded by its reasoning, but must exer-

cise an independent judgment when called upon to determine the Federal question, whether the Act, as construed and applied, is repugnant to the restrictions of the Federal Constitution.

*Ward* v. *Krinksy*, 259 U. S., 503, 42 S. Ct., 529, 66 L. Ed., 1033.

No particular form of words or phrases is essential to draw in question the validity of a state statute before the state Courts so as to give the Supreme Court of the United States jurisdiction to review an adverse decision, but it is sufficient if the claim of invalidity and the ground therefor are brought to the attention of the state Court.

*New York, ex rel.* v. *Chas. F. Zimmerman*, 278 U. S., 63, 73 L. Ed. (Adv. 52), 49 S. Ct. Rep., 61.

And the identical question presented for determination in this litigation has been adjudicated by this Court in favor of appellant, when it was held that a license fee imposed on an interstate carrier by bus cannot be sustained as a police measure if it is not imposed as an inspection scheme, and it does not appear that the proceeds are applied to defraying the expenses of such regulation, and that the amount collected is no more than is reasonably required for the purposes.

*Sprout* v. *South Bend*, 277 U. S., 163, 72 L. Ed., 833, 48 Sup. Ct. Rep., 502.

Dated this 25th day of August, 1930.

Respectfully submitted,

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